



## Fraud Facts Returns!

After a hiatus, *Fraud Facts* returns!

*Fraud Facts* is a publication of the Deputy General Counsel (Contractor Responsibility) (SAF/GCR) designed to present current information about selected fraud, suspension and debarment actions, defense contractor ethics issues as well as issues of concern to the procurement fraud community, generally.

The SAF/GCR team protects the Air Force by debarring and suspending non-responsible contractors based on a wide variety of misconduct and serves as the Air Force central authority for coordination of remedies on procurement fraud investigations.

In the past, *Fraud Facts* has featured suspension and debarment articles, discussion of coordination of remedies among stakeholders, features on developments in the contractor ethics arena, and articles from across the acquisition fraud community.

The reinvigorated *Fraud Facts* will revive many of the features that made the newsletter successful in the past, and add new features such as issue spotlights that will focus on topics of concern to the Air Force.

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Questions, suggestions and short articles for publication should be directed to David Robbins at [david.robbsins@pentagon.af.mil](mailto:david.robbsins@pentagon.af.mil).

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## Air Force Welcomes New General Counsel, Hon. Charles A. Blanchard



Charles A. Blanchard is the General Counsel of the U.S. Department of the Air Force and chief legal officer and chief ethics official for the Air Force.

Prior to this appointment, Mr. Blanchard was a Partner at the Phoenix, Ariz., office of Perkins Coie Brown & Bain, with a practice that focused on complex commercial litigation, antitrust, state constitutional law and election law. In addition to his career at Perkins Coie, Mr. Blanchard's more than 20-year legal career includes many years of public service, including positions as the chief attorney at two fed-



## Air Force General Counsel (cont'd)

eral government agencies.

From 1999 to 2001, he served as General Counsel of the Army, where he acted as the top legal officer to the Department of the Army. From 1997 until 1999, he served as Chief Counsel to the White House Office of National Drug Control Policy during the tenure of Barry McCaffrey as Drug Czar. Mr. Blanchard's other government experience includes two terms as a member of the Arizona State Senate; work as an Associate Independent Counsel in the Office of James C. McKay; and law clerk for

D.C. Circuit Judge Harry Edwards as well as U.S. Supreme Court Justice Sandra Day O'Connor. He also served as the Interim Homeland Security Director for Governor Janet Napolitano in 2003.

Mr. Blanchard is a 1985 graduate of Harvard Law School, where he graduated first in his class, and the John F. Kennedy School of Government, where he earned a Master of Public Policy Degree. He earned a Bachelor of Science degree from Lewis & Clark College in Portland, Ore., in 1981.

## Meet the Deputy General Counsel (Contractor Responsibility) Team



### The Deputy General Counsel (Contractor Responsibility) is:

**Steven A. Shaw.** Mr. Shaw is a member of the Senior Executive Service. As the Air Force debarring and suspending official, he is the final authority within the Air Force for determining contractors' ineligibility for government contracting. He frequently speaks on fraud and ethics issues and assists defense contractors in the creation of business conduct programs.

Mr. Shaw, a graduate of Franklin & Marshall College, and American University Law School, has served as a state and federal prosecutor (Main Justice and Criminal Chief, Southern District Texas) and has been a partner in international law firms, in Houston, Texas and Washington, D.C. in the

defense of criminal and civil fraud prosecutions.

Members of SAF/GCR, in the order they appear in the photo above are:

David Robbins—Associate  
Steven A. Shaw—Deputy General Counsel  
Lynda T. O'Sullivan—Assistant Deputy  
Rodney Grandon—Director, Fraud Remedies  
Brea L'Heureux—SCEP (J.D.)  
Kelley Hampton—SCEP (J.D.)

Not pictured:

Christina Black—SCEP (J.D.)  
Horace Blankenship—Paralegal



## **“Suspension & Debarment: Emerging Issues in Law and Policy”**

**By: Steven A. Shaw, Deputy General Counsel (Contractor Responsibility)**

### Introduction:

I am frequently asked whether debarment and suspension (debarment) is still a viable option for addressing contractor misconduct in the defense industry. With consolidations increasing, are any of these large defense contractors “too big to be debarred” regardless of the misconduct?

The short answer to the question is “no.” Not only are we not prevented from debarring contractors, the need to debar them in appropriate cases increases along with the consolidations. As defense agencies increasingly depend upon ever fewer contractors, we must continually focus our insistence that those contractors act responsibly. When these contractors fail to act responsibly, we in the Government must act swiftly, regardless of the short-term effect of such actions on the availability of products and services.

This article will briefly address two of the issues debarring officials face in determining whether to debar a contractor: has the contractor acted responsibly; and, is the contractor “presently responsible”? These threshold determinations are frequently confused. Has the contractor acted responsibly questions whether the alleged underlying misconduct actually occurred. Is the contractor “presently responsible” focuses primarily on how the contractor and its management are currently addressing the problems revealed by the underlying misconduct. In determining the need for debarment, the agency must examine both the nature of the misconduct and the contractor’s response upon learning of the misconduct.

### Broad Range of Conduct May Trigger Consideration for Debarment:

The Federal Acquisition Regulation (FAR) sets forth several causes, any one of which may legally form a basis for debarment or suspension, if two conditions are met. First, information in the record must establish that the misconduct occurred by a “preponderance of the evidence” (debarment) or by “adequate evidence” (suspension). Second, there must not be an unresolved genuine dispute as to any material fact. In general, the causes fall into the following three categories:

\* **Criminal Conduct:** The FAR specifies a number of crimes, the commission of which could form a basis for debarment: (i) fraud relating to a government contract; (ii) a number of specific offenses, regardless of the existence of a public contract; and (iii) any other offense indicating a lack of business integrity that seriously affects a contractor’s present responsibility.

A contractor need not be indicted for or convicted of the crime in order to be suspended. The crime need not have been committed in connection with a government contract, and the government need not even have been the victim of the offense for debarment to follow.

\* **Contract Performance:** The FAR authorizes debarment for two categories of misconduct related to the performance of government contracts: (i) willful failure to perform in accordance with contract terms; and, (ii) a history of failure to perform, or unsatisfactory performance on one or more Government contracts. Debarment may be imposed based upon a finding as to either of these categories, by a preponderance of the evidence.



## **“Suspension & Debarment: Emerging Issues in Law and Policy” (continued)**

Proof of “willfulness” is required only in connection with a single failure to perform in accordance with contract terms. No proof of any kind of scienter is required in order to debar a contractor for a history of poor performance. A contractor may therefore be debarred for a history of even negligent performance. And in establishing that “history,” the government need not prove the existence of more than a single government contract (the FAR requires evidence of a history of poor performance in “one or more contracts.”)

\* Any Other “Serious or Compelling” Cause: Agencies may also debar contractors for “any other cause of so serious or compelling a nature” as to affect a contractor’s present responsibility. The meaning of this catchall category is left to the discretion of the agency debarring officials and indicates the view of the drafters of the FAR that debarment should be considered for types of conduct that are neither criminal nor related to government contracting, as those causes are covered in the first two categories.

### Contractor’s Response to its Misconduct is Central to the Determination of its Present Responsibility:

Debarment is authorized in the FAR only where such action is in the public interest, and is necessary for the protection of the Government. Such a finding cannot be made solely upon proof that a contractor committed misconduct that can form the basis for debarment. Following a finding of misconduct, agencies must then determine whether the contractor has met its burden of demonstrating its “*present* responsibility” for government contracting. That inquiry requires an analysis of the actions the contractor took to avoid the misconduct and changes within the organization after the misconduct was discovered to ensure that the misconduct will not recur.

Furthermore, debarring officials must conduct separate analyses of the present responsibility of a contractor and any associated individuals. While a contractor may initiate remedial measures or ethics programs and provide evidence that it has disciplined the wrongdoer, it is impossible for individuals to undertake these steps. And, following the determination that key officers or shareholders have failed to demonstrate their responsibility and that they must accordingly remain debarred, the organization’s ability to demonstrate its responsibility is problematic. Almost by definition, an organization controlled by debarred individuals cannot meet its burden of demonstrating its own responsibility.

### Conclusion:

It is precisely the broad consideration of the available causes for debarment, applied equally to both large and small contractors, that is critical for the protection of the government’s business interests. Focusing on the procedural requirements for debarment and the resulting substantive analysis, rather than on the size of the contractor facing debarment, is essential to making an appropriate responsibility determination. Making responsibility determinations the same way for large and small contractors, and offering both the same protections required by the FAR, is necessary for the government’s debarment program to function. Otherwise, the stick of removing contractors that engaged in misconduct from the government contracting system disappears along with the carrot of encouraging contractors with an otherwise clean record to establish and improve strategies and systems to avoid facing debarment in the future.





## Coordinating Fraud Remedies

Suspension and debarment are powerful tools to protect the government's business interests. They are necessary components of the government's battle with non-responsible contractors, but they are not the only tools available to battle contractor fraud. Additional criminal, civil and contractual remedies exist to complement the administrative remedies of suspension and debarment. The key for the Air Force is to ensure that in each case we bring appropriate and timely remedies to bear when dealing with allegations of contractor misconduct. This is one of the primary purposes of the Air Force Procurement Fraud Remedies Program -- to ensure that key stakeholders are communicating and cooperating in the pursuit of appropriate remedies when fraud occurs.

Coordination between the major stakeholders is critical to the Air Force's fraud remedies program. The critical stakeholders include the Department of Justice, the United States Attorney's Offices around the country, the Air Force Office of Special Investigations, the Defense Criminal Investigative Service, Air Force lawyers, the Defense Contract Management Agency (DCMA), and the acquisition community. Communication and cooperation among these critical stakeholders has been, and continues to be, essential to achieving the best outcome for the Air Force, and ultimately the taxpayer, when we are presented with contractor misconduct.

As discussed in the note, *Battling Procurement Fraud at the Air Force Materiel Command*, we believe one of the key components for achieving effective communication and cooperation among the stakeholders is the creation of working groups. Ideally, we should have fraud remedies working groups



at all levels of the Air Force, including MAJCOMs, and each installation that has contracting responsibilities. Working groups allow stakeholders the opportunity to engage with others who share in the mission of fighting fraud, waste, and abuse. Working groups help facilitate the exchange of ideas, break down barriers to cooperation, provide a forum for the flow of case-specific information, and help keep the stakeholders focused on (or, at least aware of) the Air Force's needs and priorities. If you consider yourself to be a stakeholder in the fight against fraud, we encourage you to *take the initiative* to create a functional working group if such a group does not already exist. Please note, the success of such groups requires, at a minimum, regularly scheduled meetings that foster the flow of information that adds value for the stakeholders. Each stakeholder must recognize that their input and participation is critical.

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SAF/GCR is available to assist your organization in standing up a working group. For assistance, or to discuss further, please contact:

Rodney Grandon,  
Director, Office of Fraud Remedies  
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## Spotlight on Counterfeit Parts and Product Substitution

### What is Product Substitution?

Product substitution is a broad term that generally involves a contractor not delivering the service or product that the government ordered. Although the contractor may argue, and may believe, that the goods or services provided may meet the government's needs, the goods or services were not provided in accordance with the contract specifications.

### The FAR Councils Are Focused on Product Substitution Involving Counterfeit Parts:

The FAR Councils published FAR Case 2008-019 on November 18, 2008, seeking Government and industry comment regarding: (a) whether the FAR should be revised to include a requirement that contractors selling information technology products (hardware and software) represent that such products are authentic; (b) contractor liability for selling non-authentic components to the Government; (c) whether the FAR should require resellers or distributors to certify that they are authorized to sell the components to the Government; and, (d) whether the certifications should apply if the information technology is a component of a system or assembled product.

The FAR Case proposed a definition of "counterfeit information technology product" to be "any item of information technology, including hardware and software, that is an unauthorized copy, replica, or substitute." Public meetings are ongoing.

### Counterfeit and Substituted Parts Also a Priority for the Air Force:

The Air Force has made product substitution and counterfeit parts a priority. SAF/GCR has several active cases involving counterfeit and substituted parts and has suspended and/or proposed contractors for debarment based on evidence of using counterfeit parts.

## Battling Procurement Fraud at the Air Force Materiel Command

By: Ward Buckles

Air Force Materiel Command (AFMC) is the major command responsible for acquiring and sustaining weapon systems for the warfighter. As such, it also has the lion's share of Air Force procurement fraud cases. The Acquisition Integrity Division (Division) of the AFMC Law Office at Wright-Patterson AFB pursues, and coordinates remedies for, fraud cases throughout AFMC. The Division's mission statement is to "[f]oster AFMC's ability to deliver war-winning capabilities to the warfighter by identifying, remedying and deterring procurement fraud, contractor misconduct, and acquisition-related conflicts of interest." The Division's acquisition fraud counsel focus on four areas: deterring fraud; remedying fraud when it occurs; ensuring AFMC conducts business only with responsible contractors; and returning recovered funds to the Air Force, AFMC, and program offices when possible.

Since the Acquisition Integrity Division began tracking fraud recoveries in 1994, more than \$1B has been recovered on AFMC contracts. Several years had recoveries in excess of \$100M. The fraud fighters in the Acquisition Integrity Division have played a key role in obtaining these recoveries and spreading the anti-fraud message to deter future fraud.

We believe that the best fraud deterrent is a robust, credible fraud remedies program. Because education and training play a large role in deterring fraud, AFMC's fraud counsel conduct training for contracting and program personnel, investigators, auditors, and others throughout AFMC, at the Air Force Institute of Technology, and at the Defense Acquisition University. So far in FY 09, more than 1,300 people have received fraud training.

In addition to education and training efforts, Division acquisition fraud counsel work closely with Air Force Office of Special Investigations and Defense Criminal Investigative Service investigators, Department of Justice attorneys, contracting officers, auditors and others to develop and prosecute procurement fraud cases.



## Air Force Materiel Command (cont'd)

The Division's acquisition fraud counsel bring knowledge of contract law and practices to procurement fraud cases, and coordinate criminal, civil, contractual and administrative remedies as needed. Acquisition fraud counsel are also actively engaged in initiating requests for present responsibility determinations by SAF/GCR.

The Division's initiatives include: (a) the creation of cross-functional installation fraud working groups at each of AFMC's major centers that meet quarterly to discuss procurement fraud matters, brainstorm, and conduct training; and, (b) drafting a procurement fraud indicators handbook covering the various types of fraud that occur in connection with government contracts. The handbook is available with CAC-card access at <https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/lo/lojaf/> (under "resources" tab) and is intended to assist those who deal with government contracts to recognize when fraud may have occurred and to provide guidance concerning the proper response to fraud indicators.



## Mark O'Hair/Schaller: Importance of Candor Before the Suspending/Debarring Official

Mark O'Hair, who was a government civilian program manager at Air Force Research Laboratory Munitions Directorate, Eglin Air Force Base, Florida, was indicted in 2009 for steering approximately \$8 million in government contracts to a contractor, Schaller Engineering, Inc. ("Schaller") for which O'Hair served as a director, and from which he received kickbacks.

O'Hair's activities were uncovered through a joint investigation by the Air Force Office of Special Investigations and the Defense Criminal Investigative Service. Mr. O'Hair was put on administrative leave with pay in October 2007 and then separated from government employment in May 2008. The Air Force proposed O'Hair, his business partners, and Schaller for debarment as a result of the investigation (prior to their indictments). O'Hair and his business partners argued against their proposed debarments by representing that although O'Hair provided initial formation advice to Schaller, O'Hair never knew that he had been named a director of Schaller and never had any financial interest in the company. This information convinced the Air Force to terminate the proposed debarments of O'Hair's business partners and Schaller, and to lower the term of O'Hair's debarment.

Subsequently, through its ongoing investigation, the U.S. Department of Justice ("Justice") uncovered evidence that O'Hair and his business partners lied to the Air Force Suspending and Debarring Official. Specifically, Justice uncovered original documents showing that O'Hair had a financial interest in Schaller (as an undisclosed putative subcontractor), knew that he was a director, and then falsified documents to conceal that fact. The Air Force suspended O'Hair pending the outcome of the criminal proceeding. Justice also asked that the Air Force Suspending and Debarring Official testify at the criminal trial of O'Hair's business partner, Richard Schaller, who made the same claims about O'Hair's interest in Schaller to a grand jury. Mr. Shaw testified at the July 2009 trial, and Mr. Schaller was found guilty of obstruction of justice, perjury, making false statements and conflict of interest three days later.





## Recent Significant Debarment Actions

### **Air Mobility Support and Joseph Kuchta:**

Joseph Kuchta was debarred by the Air Force in February 2008. Kuchta and others then engaged in a scheme to circumvent his debarment and to compete for air terminal and ground handling support services. As a result of this egregious conduct, the Air Force extended Kuchta's debarment from 5 to 9 years, and took action against other parties involved.

**Lithium Power Technologies:** Lithium Power Technologies made false statements and a false claim to the Government in support of its efforts to obtain multiple Small Business Innovation Research contracts. The Air Force debarred Lithium Power Technologies for ten years.

**Bilfinger Berger Hochbau GMBH (BBH):** BBH is a large holding company owning a diverse line of construction businesses in Germany. The Air Force debarred BBH, its affiliates, and several individuals following a joint U.S./German investigation into allegations of significant corruption and fraud in connection with the U.S. government funded construction contracts performed by BBH and its various subsidiaries. The joint investigation revealed numerous instances of bribes and other improper behavior paid by BBH, its officers and employees. The investigation has also resulted in a joint effort to refocus the U.S. government's contracting practices in Germany.

## Recent Significant Suspension Actions

**Western Titanium:** Western Titanium and several of its principals were indicted for fraud in connection with purchasing and providing to prime defense contractors nonconforming titanium. The nonconforming titanium made its way into aircraft parts and components delivered through prime contractors to the Government. The Air Force suspended Western Titanium and its indicted principals pending the outcome of the criminal litigation. GCR also has been working with the various Air Force stakeholders to coordinate efforts to protect, preserve, and exercise contract remedies associated with the introduction of parts and components into the Air Force supply chain containing nonconforming titanium.

**MACH 2 Metals, Inc.:** MACH 2 Metals was suspended for executing false certifications of analysis regarding the properties of the fraudulent titanium produced by Western Titanium.

### **Visit GCR On-Line at:**

<http://www.safgc.hq.af.mil/organizations/gcr/index.asp>

#### **Site includes:**

- ☐ Information about the suspension/debarment and fraud remedies processes.
- ☐ Useful links to the FAR, DFARS, and resources such as the DCIS Procurement Fraud Toolkit.

*The views and opinions of the authors expressed herein do not necessarily state or reflect the official policy or position of the Department of the Air Force, Department of Defense or the United States Government.*



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